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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of<br>1993 Annual Access Tariff Filings<br><br>GSF Order Compliance Filings | CC Docket No. 93-193,<br>Phase I, Part 2 |
| In the Matter of<br>1994 Annual Access Tariff Filings | CC Docket No. 94-65 |
| In the Matter of<br>1995 Annual Access Tariff Filings | |
| In the Matter of<br>1996 Annual Access Tariff Filings | |

**APPLICATION FOR REVIEW**

Pursuant to section 1.115 of the Commission's Rules (47 C.F.R. §1.115), Pacific Bell files this Application for Review of the Common Carrier Bureau's Memorandum Opinion and Order DA 97-1326, dated June 25, 1997. The Order is in conflict with prior Commission rules and orders, in that it requires Pacific Bell to share an amount in excess of that which is permitted by Commission rule. In addition, the Commission failed to rule on the issues raised in the comments on the Tariff Review Plan filed May 8, 1997, and Pacific Bell's reply thereto.[1]

[1] In the Order, the Commission erroneously reports that Pacific Bell's reply dated May 27, 1997 was filed in response to the Bell Atlantic Petition for Clarification. This is incorrect. Pacific Bell's reply was filed in response to AT&T's and MCI's comments opposing the TRP filed May 8, 1997. The

Background

On April 17, 1997 the Commission released an order resolving tariff investigations that had been ongoing for many years. Beginning with the 1993 annual access filing, and continuing through the 1996 access filing, the Bureau suspended the rates for one day, imposed an accounting order and initiated an investigation of the tariffs.[2] One issue in those tariff investigations was whether Pacific Bell and Bell Atlantic had properly excluded end user revenues from the common line basket for purposes of determining sharing allocations. In the April 17, 1997 order, the Bureau determined that these revenues should not have been excluded. Pacific Bell is not contesting this determination. The April 17 order directed Pacific Bell to correct the sharing allocation among baskets and implement refunds.

In compliance with Commission requirements, Pacific Bell filed its Tariff Review Plan on May 8, 1997 containing the reallocations resulting from the April 17 order. To comply with the Commission's April 17 order, Pacific Bell recalculated its price cap indices ("PCIs") for all baskets for the time periods in question. It additionally calculated exogenous decreases in the common line basket to account for additional sums that should have been applied to that basket for sharing purposes. In addition, offsetting exogenous increases were calculated for the other baskets so that the amount of sharing would still be calculated at 50%, and not some greater percentage. As we illustrate below, the upward adjustments are necessary in order to comply with existing price cap rules regarding sharing and are not precluded by the Order.

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Commission did not directly rule on those issues. Instead, the Order refers only to the Bell Atlantic Petition for Clarification and order Pacific Bell and Bell Atlantic to file revised tariffs.

[2] With respect to the 1993 Annual filing, the Bureau did not suspend Pacific Bell's rates for one day. Therefore, the April 17 Order does not require refunds for that year.

On May 19, 1997, AT&T and MCI filed comments on the TRP opposing the way Pacific Bell reallocated its sharing liability. Pacific Bell filed its reply to AT&T and MCI on May 27, 1997.

During this time, Bell Atlantic filed its Petition for Clarification regarding the method to be used to reallocate sharing for the years in question. Pacific Bell filed comments on the Petition for Clarification on June 4, 1997.

On June 25, 1997, the Bureau issued its Memorandum Opinion and Order, DA 97-1326, addressing Bell Atlantic's Petition for Clarification, and ordering Pacific Bell and Bell Atlantic to file revised tariffs in accordance with the order. The June 25 order does not mention the pleading cycle on the Pacific Bell's May 8 TRP, and mistakenly characterizes Pacific Bell's May 27 reply comments as reply comments to Bell Atlantic's Petition.[3] The order also does not even mention the joint comments of Southwestern Bell and Pacific Bell filed June 4 in support of Bell Atlantic's Petition for Clarification.

Pacific Bell seeks review of the June 25 order in that it incorrectly disallows the symmetric exogenous increases sought in order to correct the sharing misallocation which occurred from 1994-1996.

ARGUMENT

The Commission, in the April 17 Order, requires refunds to be calculated by a one time exogenous cost adjustment.[4] Paragraphs 104 and 105 provide the methodology for calculating refund liabilities resulting from overcharges caused by the sharing misallocation. However, as Bell Atlantic

[3] see n. 13 of the June 25 order.

[4] Order ¶104-106.

points out, an additional adjustment is required in order to comport with the price cap rules. An equal positive exogenous adjustment is necessary to adjust the Traffic Sensitive and Trunking basket's PCIs to correct for the over-allocation of sharing to these two baskets. If the Commission were to find otherwise, carriers would be forced to share more than the amount required by the Commission's rules.

In the course of the annual filings in which Pacific Bell calculated sharing in the manner the FCC has now found to be improper, neither the Commission nor petitioners ever disputed the amount of sharing. Rather, it was the allocation of sharing among the baskets that was subject to investigation.[5] In fact, in their original submission on the annual filings at issue, AT&T called for revenue-neutral upward and downward PCI adjustments by Bell Atlantic and Pacific Bell.[6] And, the Commission's April 17 Order also acknowledged that upward and downward PCI adjustments were appropriate to correct the sharing misallocation.[7] The original price cap rules prescribed a 50-50 sharing zone when LECs earn between 12.25% and 16.25%.[8] Those rules therefore require a prescribed 50% sharing amount. The Price Cap Order and rules, and the LEC Price Cap Performance Review do not prescribe a deviation from that amount for any reason.

The Bureau seeks to justify its conclusion by claiming that we should have been on notice that the allocation method was potentially unlawful. Therefore, the Bureau argues, we assumed any risk of a refund and had no reasonable basis to assume we could make up undercharges through

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[5] See 1994 Annual Access Tariff Filing, CC Docket 94-65, Memorandum Opinion and Order Suspending Rates, (1994) ¶11.

[6] See, for example, Petition of AT&T Corp., filed April 26, 1994, Appendix C.

[7] Order, ¶ 97, et. seq.

[8] Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786 (1990) ("Price Cap Order"); 47 C.F.R. 61.45(d)(2). Subsequently, different sharing productivity options were prescribed. LEC Price Cap Performance Review, 10 FCC Rcd 8961 (1995).

prospective rate increases. This is wrong for at least two reasons. First, as stated above, the Bureau is assuming a fact not before it. No rate increase was sought; no rate increase has been requested. Thus, we are not trying to use a rate increase to make up for any loss.

Second, while the Bureau claims that we should have known the allocation method was potentially unlawful, and that "[t]he Bureau's 1992 Annual Access order clearly stated that carriers must allocate sharing on the basis of 'total basket revenues,'"[9] the Bureau's actions belie this notion. It took the Bureau over 5 years to resolve the issue in these tariff investigations as to whether end user revenues were properly excluded. If it were as clear as they now make it sound, the order should have issued immediately in 1993, and there wouldn't have been an issue in 1994, 1995 or 1996. We note that in the 1993 order on the Annual filing, the Commission stated that "It is not clear that Bell Atlantic's exclusion of end user revenues from the common line basket for sharing purposes is consistent with the LEC Price Cap Order and the 1992 Annual Access Order. We conclude that there is sufficient uncertainty to warrant investigation of Bell Atlantic's PCI adjustments."[10] So, the issue was obviously not as "clear" as the Bureau now makes it seem.

In addition, the Bureau erroneously relies on the reasoning in FPC v. Tennessee Gas. The Bureau claims it is following the "longstanding policy that carriers cannot generally recoup past undercharges by prospective rate increases."[11] That is not pertinent here. First, no recoupment is being attempted. As explained below, no rate increase is sought. Rather an exogenous increase is sought.

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[9] June 25, 1997 Order, ¶16.

[10] 1993 Annual Access Tariff Filings, CC Docket 93-193, Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, issued June 23, 1993. Pacific Bell was not named in the Order suspending rates even though it used a similar methodology as Bell Atlantic. See April 17, 1997 Order ¶40.

[11] June 25, 1997 Order, ¶15.

Second, Tennessee Gas has no applicability to a case involving a section 205 prescription of rates. Tennessee Gas involved a carrier's filing of a rate later found to be unlawful. Section 204 of the communications Act requires carriers to bear the burden of proving rates are just and reasonable. Section 205, on the other hand, requires the Commission to determine what the appropriate rate is. Sharing is authorized under section 205 authority and therefore is a Commission directive, not a carrier's choice. The Commission cannot alter a prescribed rate without going through the process and making the findings required by section 205. No such process has occurred here. The Bureau is limited by the Commission's prescription of a 50% sharing level. It cannot increase that level now by not permitting the offsetting exogenous changes. Third, the analysis in Tennessee Gas is dependent on the unrelatedness of the rates sought to be increased. This is also inapposite here since the offsetting exogenous increases in Traffic Sensitive and Trunking baskets are integral to and very much related to the exogenous decrease in the Common Line basket.

The Bureau incorrectly states that it has "conclude[d] that Bell Atlantic's and Pacific Bell's proposed rate increases as set out in their revised TRPs violate the 1993-96 Annual Access Order."[12] However, Pacific Bell's May 8 TRP contains NO proposed rate increase. As explained above, Pacific Bell sought an offsetting exogenous increase in the PCIs for 2 baskets. However, no rates were proposed to be increased. Thus, the Bureau's reliance on this "rate increase" as a reason why offsetting exogenous adjustments should not be allowed

If LECs were required to include only the negative adjustment to the Common Line basket and ignore the corresponding upward adjustments to the other baskets, the effect would be not to correct the sharing misallocation, *but to distort it even further*. LECs would then be sharing more

[12] June 25, 1997 order ¶14.

than 50% for the time periods in issue. Our calculations show that if AT&T and MCI prevail on this issue, Pacific Bell would be forced to share over 64% of its earnings during the affected time periods; nearly 30% more than what the rules require.[13] *Neither Bell Atlantic's nor Pacific Bell's total sharing obligation is or ever has been in question; it is only the method used to allocate the obligation to the baskets that is at issue.*

Customers are not harmed by these offsetting upward adjustments to these indices. Allowing Bell Atlantic and Pacific Bell to include the corresponding upward exogenous adjustments to the Switching and Trunking baskets will not overly advantage or disadvantage any particular customers. Precluding these offsetting PCI adjustments would result in the Commission giving an undue windfall to access customers.

Pacific Bell's methodology looks at the actual PCIs in each basket and compares that with the PCIs that should have been in place had we calculated our sharing adjustment as required in the Order. As William Taylor explains in his affidavit (page 10) attached to Bell Atlantic's Petition for Clarification filed May 19, 1997:

> The result of that calculation can be positive or negative in any basket, and in aggregate, customers of interstate services were not overcharged at all. The correct amount of earnings sharing adjustment was calculated and returned to customers through reductions in the PCIs, SBIs and CCL rates over all four baskets in every year. If the allocation had been done in accordance with the 1993-96 Access Tariff Order, the allocation across baskets would have been different in each year, but the total amount returned to customers would have remained the same as was actually returned to customers in each year.

We agree with Dr. Taylor's conclusions. The Commission states that the PCIs should be trued up to "what would have been in place had they been calculated consistent with the

[13] See Appendix A attached for these calculations.

Commission's rules and decisions."[14] An adjustment across all baskets is the only way to reallocate sharing dollars while recognizing that the total amount of sharing was proper. An exogenous decrease in the Common Line basket must necessarily be accompanied by upward adjustments in the other baskets or the effect is to require greater than 50% sharing. The Commission lacks authority to burden a LEC with an obligation greater than its rules permit.

In conclusion, the Commission should overturn the Bureau's order and permit Pacific Bell to adjust all baskets to appropriately correct the misallocation of sharing. Using this procedure is the only way consistent with the Commission's rules to ensure that no party gets a windfall, and no party is adversely affected from the reallocation.

Respectfully submitted,

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[14] Order ¶97.

## Certificate of Service

I, Elaine Temper, hereby certify that the Application for Review of Pacific Bell to CC Docket No. 93-193, Phase I, Part 2 and CC Docket No. 96-45 has been served this 25th day of July, 1997 to the Parties of Record.

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